MOTION FILED

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No. 03-1037

In the

Supreme Court of the United States

SHARRON E. ANGLE, et al.,

Petitioners,

v.

HON. KENNY C. GUINN, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA LEGISLATORS* IN SUPPORT OF PETITIONERS

GREGORY T. BRODERICK
TIMOTHY SANDEFUR
Of Counsel
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

*Counsel for Amici Curiae Pacific Legal Foundation and California Legislators**

*Full list of Amici Legislators on pages 1-2.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) and the following named members of the Legislature of California respectfully move this Court for leave to file the attached amicus curiae brief in support of Petitioners, Sharron Angle, *et al.* Consent to the filing of this brief has been granted by counsel for Petitioners, and has been lodged with the Clerk of this Court. Although Respondent Legislature of Nevada and Respondent Hon. Mark Amodei, *et al.*, have granted their consent, Respondent Hon. Kenny Guinn has withheld consent, necessitating the filing of this motion.

PLF is joined in this motion by the following members of the California Legislature:

Members of the California Assembly

Hon. Greg Aghazarian, 26th Assembly District

Hon. Patricia Bates, 73d Assembly District

Hon. John Benoit, 64th Assembly District

Hon. Russ Bogh, 65th Assembly District

Hon. John Campbell, 70th Assembly District

Hon. Dave Cogdill, 25th Assembly District

Hon. Dave Cox, 5th Assembly District

Hon. Bob Dutton, 63d Assembly District

Hon. Bonnie Garcia, 80th Assembly District

Hon. Tom Harman, 67th Assembly District

Hon. Ray Haynes, 66th Assembly District

Hon. Guy Houston, 15th Assembly District

Hon. Rick Keene, 3d Assembly District

Hon. Doug La Malfa, 2d Assembly District

Hon. Jay La Suer, 77th Assembly District

Hon. Ken Maddox, 68th Assembly District

Hon. Abel Maldanado, 33d Assembly District

Hon. Bill Maze, 34th Assembly District

Hon. Kevin McCarthy, 32d Assembly District

Hon. Dennis Mountjoy, 59th Assembly District

Hon. Alan Nakanishi, 10th Assembly District

Hon. Robert Pacheco, 60th Assembly District

Hon. George Plescia, 75th Assembly District

Hon. Keith Richman, 38th Assembly District

Hon. Sharon Runner, 36th Assembly District

Hon. Steve Samuelian, 29th Assembly District

Hon. Tony Strickland, 37th Assembly District

Hon. Mark Wyland, 74th Assembly District

Members of the California Senate

Hon. Dick Ackerman, 33d Senate District

Hon. Jim Battin, 37th Senate District

Hon. Ross Johnson, 35th Senate District

Hon. Dennis Hollingsworth, 36th Senate District

Hon. Pete Knight, 17th Senate District

Hon. Tom McClintock, 19th Senate District

Hon. Bruce McPherson, 15th Senate District

Hon. Bill Morrow, 38th Senate District

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF participated as amicus in the Supreme Court of Nevada in this case.

PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and individual rights. PLF has defended taxpayers in cases involving the constitutional rights of representation and the balance of power between states and the federal government, including participating as amicus in *City of Rome v. United States*, 446 U.S. 156 (1980), *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), and *United States v. Lopez*, 514 U.S. 549 (1995).

Amici urge this Court to grant review. In addition to the Petitioners' due process and equal protection claims, the decision below violates the Constitution's Republican Guarantee Clause. That Clause prohibits a sudden and undemocratic shift in the operations of government from immediately altering the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their state constitutional provisions. Because of the unusual nature of the Guarantee Clause argument, and unique circumstances of this case, Amici believe that further discussion will aid this Court in considering the petition. Amici Pacific Legal Foundation and members of the California Legislature believe that they can add insight as to why it is important for this Court

to grant the petition and respectfully request that this motion to file a brief amicus curiae be granted.

DATED: February, 2004.

Respectfully submitted,

GREGORY T. BRODERICK
TIMOTHY SANDEFUR
Of Counsel
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and California Legislators

QUESTION PRESENTED

The Nevada Constitution requires all tax bills to receive a two-thirds vote in the Legislature. When a tax bill fell one vote short, the State Supreme Court ordered the Legislature to disregard the two-thirds requirement and proceed under simple majority rule. Does such an order violate the federal Constitution's guarantees of a republican form of government, due process of law, and the right to have one's vote counted?

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ended its regular session on June 3, 2003, without passing an education budget.

That day, Governor Guinn exercised his constitutional authority to call the 19th special session of the Legislature and to limit the issues for that session solely to education spending and tax increases. Notwithstanding lengthy negotiations, and repeated requests to reopen past spending decisions, no legislative agreement was reached. Gov. Guinn dissolved the session on June 12, rather than allowing the Legislature to consider cutting previous spending levels. Later that day, he called the 20th special session, again prohibiting the Legislature from reconsidering previous spending decisions. Still lacking the votes to pass a tax increase, the Legislature again failed to pass an education budget and tax bill. The tax increase bill ("SB 6") fell *a single vote short* of the constitutionally required two-thirds.

At midnight on July 1, Governor Guinn filed in the Nevada Supreme Court a petition for a writ of mandamus against the Legislature and individual Legislators, to compel them to appropriate money for schools and to increase taxes. After expedited briefing, the court granted the writ on July 10, ordering the Legislature to disregard the two-thirds provision and "proceed . . . under simple majority rule." *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269, 1276 (Nev. 2003) (*Guinn I*). The court explained that "[w]hen a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield." *Id.* at 1275. The state supreme court suspended the two-thirds requirement for raising taxes, again characterizing it as merely "procedural." *Id.* at 1276. Shortly thereafter, the Assembly convened and voted on SB 6. It received a simple majority vote, not two-thirds, but (ignoring Petitioners' point of order) the Speaker of the Assembly declared the bill "passed."

Shortly thereafter, the holdout legislators filed a lawsuit in district court challenging the Speaker's declaration that the bill had passed. Within a week, the court dismissed that challenge on the grounds that under the *Rooker-Feldman* abstention doctrine, either the state supreme court should grant a petition for rehearing or this Court should intervene. *Angle v. Legislature of the State of Nevada*, 274 F. Supp. 2d 1152 (D. Nev. 2003). The Petitioners immediately filed a motion for reconsideration in the Nevada Supreme Court. Shortly thereafter, the Assembly voted on a second tax-increase bill, "SB 5," which again received a simple majority vote, rather than the constitutionally required two-thirds. This, too, the Speaker deemed as passed by a simple majority. These bills were then transmitted back to the Senate, where no further action has been taken on them. Shortly after these bills were returned to the Senate, one legislator, wishing to avoid a "constitutional crisis," decided to vote for a tax increase, and a third tax increase bill, called "SB 8," received a two-thirds vote and was deemed passed. This bill passed the Senate by two-thirds as well and was signed into law. SB 5 and SB 6, though allegedly "passed," have not yet been signed by the Governor.

On September 17, the state supreme court denied the Petitioners' motion for reconsideration, but also refused to vacate its former decision as moot under the doctrine of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *Guinn v. Legislature of the State of Nevada*, 76 P.3d 22, 33 n.46 (Nev. 2003) (*Guinn II*). Instead, the court "clarified" its earlier ruling:

> To avoid an impasse harmful to public education, we determined that the supermajority provision could not be improperly used to avoid majority rule on budget appropriations. Accordingly, we held that the Legislature could suspend the supermajority rule in favor of a vote by a legislative majority, in this very narrow circumstance, in order to fulfill its obligations to fund education and balance the budget

> . . . . Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties.

Id. at 32-33.

Now, individual legislators, named as defendants in the original proceedings, petition this Court for a writ of certiorari on the grounds that the decision below violates the Fourteenth Amendment—by depriving Petitioners of their right to have their votes counted and their right to due process of law—as well as the Republican Guarantee Clause of Article IV of the United States Constitution.

SUMMARY OF ARGUMENT

The Nevada Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). This case provides a rare opportunity for the Court to clarify the standards under which citizens may seek protection under the Republican Guarantee Clause, U.S. Const. art. IV, § 4. This Court has often described in dicta the type of facts that could constitute a violation of the Clause—this case meets those criteria. There are no compelling reasons to regard Petitioners' claim as a political question, because there is no dispute with a coordinate branch of the federal government and there are judicially manageable standards for applying the Guarantee Clause in this case. The Clause protects citizens against a sudden and undemocratic shift in the operations of government which immediately alters the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional provisions.

In this case, the Nevada Supreme Court permitted a sudden and undemocratic shift in the state's method of functioning and allowed two bills to be "passed" in violation of

the constitutionally required two-thirds vote. This Court has explained that citizens may assert the Guarantee Clause when the state government ceases to operate by the "orderly and settled methods prescribed by its fundamental law," *Taylor v. Beckham*, 178 U.S. 548, 580 (1900), or stops following "the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes." *Duncan v. McCall*, 139 U.S. 449, 462 (1891). That is precisely what has happened here. Moreover, since the state supreme court refused to vacate its decision, the Nevada Legislature apparently retains the power to ignore the two-thirds requirement at any future date.

What the court below called a "constitutional conflict" was in fact deliberately created for political purposes by the Governor's choice to limit the scope of the special legislative sessions. The only reason the court felt it necessary to disregard the two-thirds vote requirement that the people adopted for tax increases was because the Governor, through procedural manipulations, prohibited the Legislature from addressing education funding through actions it could take by simple majority votes (i.e., cutting spending in other areas). The state supreme court chose to resolve this manufactured conflict through the drastic action of giving the Legislature a "pass" as to the constitutional vote requirements, when the impasse could easily have been resolved through regular legislative process by directing the Governor to allow the Legislature to consider the spending matters. This would have ensured that the Legislature fund education without setting aside any constitutional provisions, by requiring that the Legislature reopen its debate on the budget. Note: *Nevada Supreme Court Sets Aside a Constitutional Amendment . . .*, 117 Harv. L. Rev. 972, 976 (2004) (hereafter "*Sets Aside*") ("Had the court in *Guinn* deferred to the legislature by requiring it to fund education, without favoring a specific means of doing so, it would have avoided tension between constitutional provisions").

This case is not of merely academic significance. As Petitioners note, at least fifteen other states have supermajority requirements for tax increases. Political forces in those states, seeking to evade those requirements, look upon this decision as an opportunity to erase them. Indeed, shortly after the Nevada Supreme Court reached its decision, California Superintendent of Public Instruction Jack O'Connell held a press conference to announce that he would file a similar lawsuit in the California Supreme Court. *See* Jessica Portner, *Simple Majority Sought on Budget: Schools Chief to Ask High Court to Help Unlock Money for Education*, San Jose Mercury News, July 18, 2003 (2003 WL 57855730). Although the California budget impasse ended before O'Connell filed his suit, there is real potential that such tactics will be used to seriously damage state constitutional safeguards for taxpayers. *See, e.g.*, David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 Ark. L. Rev. 519, 538-39 (2003) (noting possibility of *Guinn*-style case in Arkansas). This Court should at least protect Nevadans against the Nevada Supreme Court's unprecedented decision to erase the state constitution's unqualified command on the grounds that that command imposes a merely "procedural requirement."

ARGUMENT

I

PETITIONERS' GUARANTEE CLAUSE CLAIM IS JUSTICIABLE

The United States Constitution guarantees to every state and its citizens a republican form of government. U.S. Const. art. IV, § 4. The Guarantee Clause protects the rights of citizens to establish legitimate state constitutional rules and to have their state governments follow those rules. *Sugarman v. Dougal*, 413 U.S. 634, 648 (1973); *United States v. Vazquez*, 145 F.3d 74, 84 (2d Cir. 1998); *In re Initiative Petition No. 348*,

820 P.2d 772, 780 (Okla. 1991). Although this Court has sometimes interpreted the Guarantee Clause as an entirely political matter, this is one of the rare cases in which the Court can and should enforce the guarantee to protect the citizens and the Constitution of Nevada.

A. Early Cases Examined the Merits of Republican Guarantee Claims

In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), this Court held that the Guarantee Clause did not allow the Court to decide which of two rival governments of Rhode Island was legitimate, because when "the people of the State . . . alter and change their form of government," it is for Congress to determine whether their doing so violates the Guarantee Clause. *Id.* at 47. Although *Luther* was later read to absolutely limit enforcement of the Guarantee Clause to the political branches, it did no such thing. *See Colegrove v. Green*, 328 U.S. 549, 556 (1946).

In the years following *Luther*, this Court "addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." *New York v. United States*, 505 U.S. 144, 184 (1992). *See, e.g., Minor v. Happersett*, 88 U.S. 162, 175-76 (1874); *Forsyth v. City of Hammond*, 166 U.S. 506, 519 (1897); *Michigan v. Lowrey*, 199 U.S. 233, 239 (1905). The Court addressed the merits of Republican Guarantee Clause claims at length in *Duncan v. McCall*, 139 U.S. 449 (1891), and in *Taylor v. Beckham*, 178 U.S. 548 (1900), and again did not dismiss the cases as nonjusticiable. Other courts also found Guarantee Clause arguments to be justiciable. *Kadderly v. Portland*, 74 P. 710, 719 (Or. 1903); *Beach v. Bradstreet*, 82 A. 1030, 1032 (Conn. 1912); *Cleveland v. Ruple*, 200 N.E. 507, 510 (Ohio 1936).

Finally, in *New York*, this Court acknowledged that the *Colgrove* Court was wrong to categorize all Guarantee Clause arguments as nonjusticiable. 505 U.S. at 184-85. *New York* involved a federal law which essentially commanded states to

regulate radioactive waste disposal. *Id.* at 174-75. This federal law had three provisions, including a provision declaring that if a state refused to regulate the waste in the manner Congress set forth, the state was required to take title to it. *Id.* at 175. The state argued that all three provisions of the law violated several clauses of the Constitution, including the Tenth Amendment and the Republican Guarantee Clause. The Court found that the "take title" provision did violate the Tenth Amendment, *id.* at 177, so the Court did not find it necessary to resolve the Guarantee Clause claim against that provision. *Id.* at 183-84. But, the Court did address the merits of the Guarantee Clause claim against two other provisions:

> In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the "political question" doctrine. . . . This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable . . . . We need not resolve this difficult question today. Even if we assume that petitioners' claim is justiciable, neither [of the remaining provisions] . . . pose any realistic risk of altering the form or the method of functioning of New York's government.

Id. at 184-86.

New York strongly suggests that Guarantee Clause claims are justiciable in some limited circumstances: namely, when an act poses a "realistic risk" of altering the "method of functioning" of a state's government. That is precisely the situation presented here.

B. There Are Judicially Manageable Standards for Adjudicating a Republican Guarantee Claim

Two cases in particular set forth basic standards for weighing the merits of a Guarantee Clause claim. In *Duncan v. McCall*, 139 U.S. 449 (1891), this Court rejected an argument by a criminal defendant that the Clause prohibited his conviction under procedures not promulgated by the Texas Legislature. The Court did not dismiss the case as nonjusticiable, but held that because the state's "legislative, executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law," the Guarantee Clause was not violated. *Id.* at 462. Quoting Daniel Webster, *Duncan* indicated that the Clause would be violated if a state suddenly and undemocratically altered its form of government, especially with regard to voting provisions:

> the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule . . . . [T]he people limit themselves in regard . . . to certain forms of the conduct of elections . . . [and] our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes . . . . [T]he constitution and laws . . . [guarantee] the idea of results achieved by orderly action under the authority of existing governments . . . .

Id. at 461-62 (citation omitted).

The principle that the Clause protects the regular procedures of state law from sudden, internal, undemocratic alteration was reiterated in *Taylor v. Beckham*, 178 U.S. 548 (1900). That case involved a disputed gubernatorial election. The Court addressed the merits of the Guarantee Clause challenge, but rejected it because "[t]he procedure was in

accordance with the Constitution and laws of the state." *Id.* at 573. Since "the legislative, executive, and judicial departments of the state are peacefully operating by the orderly and settled methods prescribed by [the State's] fundamental law," and were "the result of the Constitution and laws under which they lived and by which they were bound," *id.* at 580, the Court found no violation.

Here, however, the state is not operating by the orderly and settled methods prescribed by its fundamental law: its constitution. Instead, there has been a sudden change in the method of functioning of Nevada government. That change was wrought by an undemocratic process—that is, through a judicial opinion—and it immediately deprived citizens of the participatory rights they formerly enjoyed under their government's constitutional rules, because the citizens whose representatives could have forestalled the tax hike have now been deprived of the effectiveness of their votes. *Cf. Raines v. Byrd*, 521 U.S. 811, 823 (1997) ("[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.")

In *New York*, this Court said that a Guarantee Clause challenge could succeed where an undemocratic change in state law poses a "realistic risk of altering the form or the method of functioning of [a state]'s government." 505 U.S. at 186. Since then, several lower courts have addressed Guarantee Clause challenges. *See, e.g., Vazquez*, 145 F.3d at 77 (state's decision to join federal government in lawsuit did not alter form of state government); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3d Cir. 1996) (Clause would be violated if authorities act to "alter[] the form or the method of functioning of [the state's] government."); *Kelley v. United States*, 69 F.3d 1503, 1510-11 (10th Cir. 1995) (Guarantee Clause prohibits "a fundamental restructuring of the form of state governments" and protects

citizens' right to "structure their . . . government[] as they see fit."); *In re Initiative Petition*, 820 P.2d at 780 (same); *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997) (same).

Thus, both early cases and *New York* provide a judicially manageable standard for determining when a state action[3] violates the Guarantee Clause. *New York* and its progeny essentially restate the early Guarantee Clause test: **where a sudden and undemocratic shift in the operations of government immediately alters the state's Constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional requirements, a Republican Guarantee challenge is appropriate.** *See Taylor*, 178 U.S. at 580.

C. This Case Does Not Involve a Political Question

Further, because Nevada law makes the mechanism for passing tax bills plainly and easily discernible—simply counting the number that constitutes a two-thirds vote—this case involves no complicated political value judgments which would make the political branches more appropriate for redress. This Court can easily redress Petitioners' injury by vacating the decision below. Neither does this case present a political question. Although *Luther* is often cited for the proposition that the Guarantee Clause is always nonjusticiable, this is incorrect. The *Luther* Court dismissed the claim as a political question because it suffered from defects not present here: the Court feared that a judicial ruling could create conflict with other federal branches. *See New York*, 505 U.S. at 184. But where, as here, there is no reason that the judiciary is ill-suited to enforce the guarantee, or any likelihood that the other branches of the federal government will do a superior job protecting the

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[3] *New York* involved a federal law alleged to violate the Guarantee Clause. But *Taylor*, *Duncan*, and other earlier sources, including *The Federalist*, make clear that the Clause was primarily intended to prevent state usurpations.

rights concerned, there is less reason to regard the Clause as nonjusticiable. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 853 (1994). Indeed, this Court has acknowledged that the Guarantee Clause does not always involve political questions; only where judicially manageable standards for reaching a legal conclusion are absent is the matter unfit for judicial resolution. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964). That is not the situation here.

Baker v. Carr sets forth the elements of a political question. 369 U.S. 186, 217 (1962). None of these elements are present here. This case does not seek to second-guess the executive or legislative branches; rather a judicial resolution is appropriate because the judiciary caused the injury. The standards for resolving this dispute have been explained in *Taylor*, *Duncan*, and other cases; nonjudicial discretion is not called for, since the Court is not asked to make a policy determination, but simply to prevent the violation of Petitioners' federally protected participatory rights; the Court can easily undertake independent resolution without casting disrespect on coordinate branches of the federal government—indeed, no other branch is competent to deal with the situation presented here. There is no need for adherence to a political decision as would be present in a case involving foreign policy; finally, no other department has spoken on this issue, thus potential embarrassment from multifarious pronouncements is unlikely.

This case would not engage the judiciary in "matters purely political," as in *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 141 (1912). There, the Court rejected a Guarantee Clause challenge because it would have required the Court "to disregard the existence in fact of the state . . . and practically award a decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government." *Id.* at 142. Nothing nearly so

extreme is sought here. This case presents no issue of political balancing or value judgments, nor would this case require the Court to "substitute its judgment as to a matter purely political for the judgment of Congress . . . and thus overthrow the Constitution . . . ." *Id.* In fact, this case is the opposite of *Pacific States Telephone.* In that case, a tax was imposed by an initiative, which the company argued violated the Guarantee Clause. The Court held that it would be fundamentally un-republican to "authorize the judiciary to substitute its judgment" for the judgment of the people or their legislature. *Id.* at 142. Petitioners here, however, ask only that this Court *protect* the judgment of the people when they passed the initiative creating the two-thirds rule. This case therefore involves a plain legal question: may the Nevada Supreme Court authorize the Legislature to regard a bill as "passed" with a bare majority when the state constitution requires a two-thirds vote?

II

RESPONDENTS HAVE DEPRIVED PETITIONERS OF THEIR RIGHT TO A REPUBLICAN FORM OF GOVERNMENT

In *New York*, this Court suggested that the Republican Guarantee Clause protects the citizens' rights to run their own governments and to hold state officials accountable. 505 U.S. at 186. These rights were violated here. The state Legislature has deemed a bill "passed" by a simple majority where the plain language of the state constitution requires a two-thirds vote of both houses of the Legislature. Doing so violates the Petitioners' federally protected right to have their votes count, an essential component of a republican government. *Raines*, 521 U.S. at 823.

Moreover, the state supreme court has ordered the Legislature to proceed in violation of the unambiguous command of the state constitution, on the grounds that the constitution sets forth a mere "process requirement by which

legislative action is accomplished," and which must "yield" when a bill is *really* important. *Guinn I*, 71 P.3d at 1276. There is no limit to the breadth of this "exception" and it swallows the two-thirds requirement altogether. The Nevada Supreme Court has therefore effectively amended the state constitution, eliminating the two-thirds clause by "suspend[ing] the supermajority rule in favor of a vote by a legislative majority." *Guinn II*, 76 P.3d at 32. Such an extra-constitutional "amendment" violates the Republican Guarantee Clause, and the blessing of a state's supreme court does not permit the state to violate the federal constitutional standard. *See Bush v. Gore*, 531 U.S. 98, 107 (2000) (*per curiam*) (federal courts may intervene where "[t]he State Supreme Court [has] ratified [unconstitutional acts]").

If the state supreme court can simply waive the two-thirds requirement on the grounds that it interferes with state funding needs, there is no reason why the court could not also waive the requirement of majority rule (Nev. Const. Art. IV, § 18, cl. 1), since that, too, is a "mere" procedural requirement. A state's constitution is written precisely to set forth the "process" by which legislation is created.

This is a clear instance of changing the rules in the middle of the game. Regardless of the wisdom of the two-thirds requirement adopted by the people of Nevada, that requirement is part of the state constitution, and citizens have a right to have that requirement followed. Normally, that right is protected by other branches of government through the checks and balances system, or appeal to the state's nonpolitical branch. But here, the nonpolitical branch[4] has blessed the political branches' violation of the state's clear constitutional mandate, in the process diluting the Petitioners' votes below the weight

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[4] While judges in Nevada are accountable to the people by recall and reelection, the Nevada judiciary remains a nonpolitical branch. *See Nevada Judges Ass'n v. Lau*, 910 P.2d 898, 901-02 (Nev. 1996).

required by state law. *Cf. Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote . . . ."). Nevada is no longer functioning by the "orderly and settled methods prescribed by its fundamental law," *Taylor*, 178 U.S. at 580, or following "the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes." *Duncan*, 139 U.S. at 462. Nevadans must look to this Court to protect their form of government. Since no reason exists for deferring to the political branches of the federal government, this Court should fulfill the guarantee.

III

THIS CASE DOES NOT THREATEN FEDERALISM

Although states are largely free to set their own procedures and interpret their own laws, federal courts will intervene where federal rights are at issue. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 291 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958). This is even true where the violation is done with permission of the state's high court. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 356-57, 361 (1964); *Gore*, 531 U.S. at 114-15 (Rehnquist, C.J., Scalia, Thomas, JJ., concurring). Further, because the circumstances in which the Guarantee Clause is violated are extraordinary and rare, finding this as justiciable will not seriously threaten the states' legitimate autonomy.

A. This Case Does Not Involve Merely a State Court's Interpretation of State Law

The Nevada Supreme Court couched its decision in terms of a state court interpreting that state's laws. But in fact this case presents something different. The state supreme court, at the Governor's request, has essentially changed the way laws are passed, in this particular instance. It has *not* declared the two-thirds provision unconstitutional, but has simply commanded that it "yield" because the Governor had limited

the issues that the Legislature could discuss at the special session. *See Guinn II*, 76 P.3d at 32-33 ("Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties."). Normally, even a clearly wrong state-based decision would have no federal remedy. But when that decision intrudes on federally protected rights of due process, equal protection, and the right to a guarantee of the state's republican government, it is appropriate for federal courts to enforce those federal rights.

In *Bouie*, this Court reversed a trespassing conviction handed out to civil rights protestors, even though the South Carolina Supreme Court had affirmed that conviction. The state court had, for the first time, held that the state's trespassing law prohibited "not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." 378 U.S. at 350. In its decision reversing the conviction, this Court noted that such an interpretation of the law was entirely new and unprecedented, and was a thinly-veiled attempt by the South Carolina Supreme Court to violate the Fourteenth Amendment "by judicial construction of the statute . . . ." *Id.* at 362. This "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" violated the Due Process Clause. *Id.* at 352; *see also NAACP*, 357 U.S. at 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

Petitioners and Amici are *not* arguing that the Guarantee Clause is automatically implicated whenever a court strikes down an initiative. But this case involves an unprecedented situation, in which a state's legitimately enacted constitutional framework has been altered to attain a political end, rather than

to correct the political branches' failure to protect individual liberty. This sudden and undemocratic shift in the operations of government immediately alters the state's constitution, depriving citizens of the participatory rights they formerly enjoyed under their government's constitutional rules. As such, it undermines the republican framework without accomplishing the essentially republican goal of safeguarding individual rights against majority overreaching.

B. Addressing the Merits of Guarantee Clause Claims Will Not Result in Federal Interference with State Interpretations of Their Own Law

New York and other Guarantee Clause cases provide a judicially manageable standard for determining when citizens' right to have their state constitutions followed has been violated. Yet these cases have not resulted in a flood of litigation, and are not likely to. In the eleven years since *New York*, none of the cases relying on it have found a challenged state action to violate the Clause. But where a violation does occur, where the mechanism of checks and balances normally relied upon to prevent violations of the state constitution breaks down, and where no political question is presented, citizens must rely on this Court to enforce their federal right to have their state constitutions followed.

For this Court to enforce the Guarantee Clause would not make federal courts censors of every state decision. In most cases, state policy decisions and state court interpretations of state law will not be subject to federal interference, because they will not implicate federal rights. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). When state courts do strike down state constitutional provisions for violating the federal Constitution, this Court can exercise the supervisory role it already exercises now. And when state courts strike down laws for valid state-based reasons—for violating the "single subject rule," for

example—the Guarantee Clause will not be violated because in those cases, the state courts will be operating "in accordance with legal and authentic modes." *Duncan*, 139 U.S. at 462.

Further, enforcing the guarantee would not prohibit citizens from amending their state constitutions. *Luther*, 48 U.S. (7 How.) at 47. As Alexander Hamilton explained, the Clause presents "no impediment to reforms of the State constitutions by a majority of the people in a legal and peaceable mode." *The Federalist* No. 21, at 140 (Clinton Rossiter ed., 1961). Rather, it prevents the sudden undermining of state constitutions:

> [Without a guarantee] Usurpation may rear its crest in each State and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret . . . A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.

Id. Indeed, cases which have adjudicated Guarantee Clause claims have routinely held that the people may legitimately change their forms of government in orderly and democratic ways. *In re Initiative Petition*, 820 P.2d at 780; *Kelley*, 69 F.3d at 1510-11. Granting the petition would, therefore, not undermine democratic control of state government, but would strengthen it. *See Gore*, 531 U.S. at 115 ([R]eview of a state court's decision "does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility . . . .").

Enforcing the Guarantee Clause in this case therefore would not make every state court decision striking down a state

law into a federal violation of the Guarantee Clause. But where, as here, the non political branch gives the Legislature permission to ignore the state constitution, the Guarantee Clause does protect the citizens' right to have their constitution followed.

C. This Court Should Guarantee to Nevadans Their Right to a Republican Form of Government

The decision below is a threat not only to Nevadans, but also to the citizens of all states. Shortly after the court below ruled, officials in both California and Arkansas indicated their intent to use similar tactics to avoid constitutional spending limitations. *See* Stephen Deere, *Newbern, Seen as Meticulous*, Arkansas Democrat-Gazette, Feb. 8, 2004 (2004 WL 57534921).

But even if no other state were concerned, the people of Nevada are suffering a continuing injury. Since the state supreme court refused to vacate its earlier decision as moot, the decision remains on the books and may be used in any future legislative session to escape the two-thirds requirement by fiat. *See also Sets Aside*, *supra*, at 975 ("[*Guinn*] . . . jeopardizes the integrity of procedures that are central to the separation of powers in a free republic").

The Nevada Constitution is rarely amended, and the rules for amending its Constitution by initiative are quite burdensome. Yet the two-thirds provision succeeded on those rules. The people of Nevada have a right to have that provision followed by their state government. That right is guaranteed to all citizens by the federal system. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). Where this Court is the citizens' sole protector against the threat of a lawless state government, it must intercede to protect the citizens' rights.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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Respectfully submitted,

GREGORY T. BRODERICK
TIMOTHY SANDEFUR
Of Counsel
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amici Curiae Pacific Legal Foundation and California Legislators